90-333

Supreme Court, U.S.
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No. 90-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LAMPF PLEVA LIPKIND PRUPIS & PETIGROW,
Petitioner,
VS.
JOHN GILBERTSON, JOHN V. REITZ, and
ANTHONY CATALAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER LAMPF PLEVA LIPKIND PRUPIS & PETIGROW

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QUESTIONS PRESENTED

This Court has recognized an implied private cause of action under section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), and Rule 10b-5 (17 C.F.R. 240.10b-5) promulgated thereunder. However, this Court has never determined what shall be the statute of limitations applicable to such actions. The 1934 Act has several express causes of action, which are subject to express limitations periods. The question presented is:

1. Whether private civil actions for damages under section 10(b) and Rule 10b-5 shall be governed by a specific and uniform statute of limitations borrowed from the limitations periods applicable to express causes of action under the Securities Exchange Act of 1934 rather than being subject to limitations periods borrowed from the law of the state where the action happens to be filed?

LIST OF PARTIES

The following parties were Plaintiffs below and are Respondents before this Court:

Clifford B. Alterman, John Ball, Ruth Beecher, Theodore Beecher, Carolyn Beecher, Walter L. Beers, Robert E. Boekenoogen, Charles W. Botsford, Robert Callahan, Anthony E. Catalan, Bonnie J. Chambers as Conservator of the Estate of Robert W. Chambers, Joan Chatham, Ronald Chatham, Cliff Chulos, Perry Coleman, David Collier, Leo DePretto as Personal Representative of the Estate of Howard E. White, Arlyss D. Dunham, Jack E. Evans, Janice Gilbertson, John Gilbertson, Robert A. Graham, Harry E. Groth, Jr., William L. Gunnell, Woodrow Gwyn, Floyd E. Hambleton, Robert E. Johnson, Ronald Kirkilie, Judith MacDonald, Nickolas J. Madesh, Jerry E. Marks, H. Winston Marshall, Jay L. Maxwell,

Maxwell McDonald Investments, David McCullam, James R. McDonald, Ward E. Moore, Ethel Nunemacher, Howard H. Overback, Elman Peterson, Jr., Dale R. Peterson, Joseph C. Player, Deane E. Reimann, John V. Reitz, Earl D. Riddle, Harlan C. Selby, Bruce Sigman, Edith Trykar, Theodore Trykar, C. Wayne Warren, R. Mattison White, Paul Winklesky, Larry G. Zettle.

The following parties were Defendants below and are Respondents before this Court:

Alanthus Computer Corp., Alanthus Corp., Arnheim & McCostis, Anders G. Arnheim, Berlent Industries, Inc., Harvey N. Berlent, Buhler Software Services, Roald Buhler, Comdisco, Inc., Computer Value Associates, John M. Costello, James B. Cuthbert, Jerrold Feingold, Leonard Feingold, Edward G. Fizell, Global Computer Corp., Mark A. Hanson, Richard A. Heitmeyer, Robert M. Hurwitz, Jeflen Consulting Corp., Ronald Johnson, Martin S. Karnoff, Robert M. Kirby, Kirby Microprocessors, Inc., Kirby Computer Systems, Inc., Leasing Consultants Associates, Leasing Consultants, Inc., David G. Marks, Richard M. McCostis, William L. McKenna, P-Stat, Inc., Martin D. Pine, Kenneth M. Pontikes, Gordon S. Rosen Associates, Gordon S. Rosen, Noah Schreiber, Software Systems for Word Processors, Inc., Start Systems, Inc., Technical Marketing Services, Texcom Equipment Corp., Leonard F. Turi, William A. Ward, Robert A. Weber, Richard A. Wellbrock.

The following parties were third-party defendants below and are Respondents before this Court:

Wayne Hamersly, Sherman Kellar, Mack, Roberts, Hoyle & Co., Roger Nelson, Paulson Investment Co., James D. Quenemoen, Rockwood Computer Corp., Michael Welwood, R. G. Williams.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER LAMPF PLEVA LIPKIND PRUPIS & PETIGROW

Petitioner Lampf, Pleva, Lipkind, Prupis & Petigrow respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed February 20, 1990.

OPINIONS BELOW

The unpublished memorandum decision of the Court of Appeals for the Ninth Circuit is reprinted in Appendix B. Petitioner's timely petition for rehearing was denied by an unpublished order. (App. C) The unpublished opinion of the United States District Court for the District of Oregon (Redden, D.J.) is reprinted at Appendix D.

JURISDICTION

The Court of Appeals' order denying Petitioner's timely petition for rehearing was filed on May 16, 1990. (App. C.) Petitioner's motion to stay issuance of the mandate was denied by order filed June 20, 1990. Mandate was issued July 13, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Securities Exchange Act of 1934 are set forth in Appendix A to this Petition.

STATEMENT OF THE CASE

Factual Background

Respondents include investors who purchased units in one or more of seven similar limited partnerships in 1979, 1980, and 1981.[1] Each limited partnership was described in an "Investment Memorandum" provided to potential investors. Petitioner Lampf, Pleva, Lipkind, Prupis & Petigrow ("Lampf") is a law firm located in West Orange, New Jersey, that allegedly assisted in the preparation of the investment memoranda.

Each limited partnership was created for the purpose of purchasing, and then leasing, computer equipment and certain computer software unrelated to the computer equipment. Each partnership had the potential to generate profits for the limited partners as well as attractive tax benefits.

[1]The partnerships were named: Duval Associates, Lamar Associates, Salem Associates, Columbia Associates, Mt. Hood Associates, Euston Associates, and Troy Associates.

All seven partnerships were complete economic failures, primarily because the partnerships failed to successfully market their computer software. During 1981-84 the limited partners and their general partners were repeatedly notified of facts demonstrating the partnerships' failures.

Despite the partnerships' woeful performances, the investors did not investigate the reasons for the partnerships' poor performance until 1986 when the Internal Revenue Service began disallowing the investors' tax benefits. The investors allege that at that point — five to seven years after their initial investments — they finally investigated the failure of the investments and discovered their claims.

Proceedings in the District Court

The investors filed two separate lawsuits in November 1986, alleging federal claims under section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78*j*(b)), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.[2] A third suit was later filed by Respondent Anthony Catalan.[3] Because of the obvious statute of limitations issues, the District Court limited discovery to matters relevant to the statute of limitations.

In February 1988 Petitioner Lampf and other defendants below moved for summary judgment on the grounds that the investors had failed to commence their actions

[2]*John V. Reitz, et al. v. Leasing Consultants Associates, et al.*, District of Oregon Case No. 86-1368-RE; *John and Janice Gilbertson, et al., v. Leasing Consultants Associates, et al.*, District of Oregon Case No. 86-1369-RE.

[3]*Anthony E. Catalan v. Paulson Investment Company, et al.*, District of Oregon Case No. 87-593-RE.

within the time allowed by law. Petitioner Lampf raised the issue of whether the District Court should look to federal law for the limitations period applicable to section 10(b) rather than borrowing the limitations period from the law of the forum state.

In July 1988 the District Court issued a written opinion granting Petitioner's motion in all three cases. (App. D.) Following Ninth Circuit precedent, the District Court borrowed the statute of limitations from the law of the forum state (Oregon), and held that the investors' claims were time-barred because they failed to file suit within two years from when they were on inquiry notice of their potential claims. The District Court did not address Petitioner's argument that federal law should provide the limitations period for claims under section 10(b).

Proceedings Before the Court of Appeals

The investors in all three cases appealed to the United States Court of Appeals for the Ninth Circuit, arguing there were questions of fact that precluded summary judgment. In its brief to the Ninth Circuit, Petitioner Lampf again argued that federal law — and specifically the Securities Exchange Act of 1934 — rather than state law should provide the statute of limitations for section 10(b).

The issue of the applicable statute of limitations was important because if the court looked to federal law, an absolute three-year limitations period would apply. All investors' securities claims would be indisputably time barred because all investors purchased their limited partnership interests at least five years before filing suit.

On February 5, 1990 the Ninth Circuit issued a single memorandum decision reversing the District Court's judgments on the grounds there were questions of fact

whether the investors had actual or inquiry notice of their claims more than two years before commencing their actions. (App. B.) The Ninth Circuit followed existing precedent and looked to the law of the forum state for the applicable statute of limitations. The court did not respond to Petitioner's argument that federal law should provide the limitations period.

Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. The petition for rehearing raised several issues, including the question of the applicable statute of limitations. On May 16 the petition was denied and the suggestion for hearing en banc was rejected. (App. C.)

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG AND WITHIN THE CIRCUITS REGARDING THE STATUTE OF LIMITATIONS APPLICABLE TO ACTIONS UNDER SECTION 10(b) AND RULE 10b-5

The circuit courts of appeal are divided over whether state or federal law should provide the statute of limitations for section 10(b) actions. Furthermore, conflicts are developing *within* some circuits. This Court should grant the writ of certiorari in order to resolve these conflicts.

The Third Circuit has held that federal law shall provide the limitations period for section 10(b) claims. In *In Re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 109 S. Ct. 131, 102 L.Ed.2d 103 (1988) the court held that actions under section 10(b) are subject to the limitations period that applies to express actions under the 1934 Act. Claims expressly provided for in the 1934 Act must be

filed one year from discovery of the claim and no more than three years from the date of the violation. 15 U.S.C. §§ 78*i*(e), 78*r*(c), 78*cc*(b).

The Third Circuit's holding relied on this Court's decisions in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987) and *Del Costello v. Teamsters*, 462 U.S. 151 (1983), where this Court indicated that lower courts should reconsider their predilection for looking to state law to find limitations periods for federal actions.

The two circuits that have addressed the issue after *Data Access* have declined to follow the *Data Access* approach. The Ninth and Eleventh Circuits have held recently that they will continue to look to state law for the applicable statute of limitations. *Nesbit v. McNeil*, 896 F.2d 380, 384 (9th Cir. 1990); *Smith v. Duff and Phelps, Inc.*, 891 F.2d 1567, 1569-70 (11th Cir. 1990).[4] Thus, there is a clear conflict between the Third, Ninth, and Eleventh Circuits.

There is a further conflict between the Third Circuit and other circuits that have traditionally looked to state law for the statute of limitations, but which have not revisited the issue since *Data Access*. Each of the following circuits holds that the limitations period for section 10(b) claims should be borrowed from state law:

FIRST CIRCUIT: *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 124 (1st Cir. 1987); *In Re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1003, 1010 (D. Mass. 1988).

[4]In this case the Ninth Circuit ignored the issue entirely.

SECOND CIRCUIT: *Armstrong v. McAlpin*, 699 F.2d 79, 86 (2d Cir. 1983); *Azurite Corp. Ltd. v. Amster & Co.*, 730 F. Supp. 571, 582 (S.D.N.Y. 1990).

FOURTH CIRCUIT: *Gurley v. Documation, Inc.*, 674 F.2d 253, 258 (4th Cir. 1982).

FIFTH CIRCUIT: *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988).

SIXTH CIRCUIT: *Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1081-82 (6th Cir. 1986); *Nichols v. Merrill Lynch, Pierce, Fenner & Smith*, 706 F. Supp. 1309, 1335 (M.D. Tenn. 1989).

SEVENTH CIRCUIT: *Norris v. Wirtz*, 818 F.2d 1329, 1333 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987).

EIGHTH CIRCUIT: *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); *Dingler v. T.J. Raney & Sons, Inc.*, 708 F. Supp. 1044, 1053-55 (W.D. Ark. 1989).

TENTH CIRCUIT: *Loveridge v. Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1982); *Marchese v. Nelson*, 700 F. Supp. 522, 524 (D. Utah 1988).

D.C. CIRCUIT: *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977).

In addition to the conflict *among* the circuits, splits are emerging *within* some circuits. District courts in the Second, Seventh, Eighth, and Eleventh Circuits have rejected existing circuit precedent and adopted the *Data Access* rule. *Welch v. Cadre Capital*, 735 F. Supp. 467, 480-82 (D. Conn. 1989); *Robertson v. Deloitte, Haskins & Sells*, 732 F. Supp. 979, 984-85 (E.D. Ark. 1990); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 695 F. Supp. 1156, 1159-62 (D. Wyo. 1988); *Bernstein v. Crazy Eddie, Inc.*, 702 F.

Supp. 962, 981 (E.D.N.Y. 1988); *Kayne v. PaineWebber, Inc.*, 703 F. Supp. 1334, 1343 (N.D. Ill. 1989).

In summary, there is a conflict *among* the circuits and *within* the circuits. Only this Court can bring peace to this chaotic situation, which will become more chaotic and unpredictable with the passage of time. Accordingly, the writ of certiorari should be granted.

II.

IT IS OF VITAL PUBLIC IMPORTANCE THAT THIS COURT BRING CERTAINTY, PREDICTABILITY, AND UNIFORMITY TO THE FIELD OF SECURITIES LAW BY DECIDING THE LIMITATIONS PERIOD APPLICABLE TO SECTION 10(b) ACTIONS

There are few matters in the law more important or more beneficial than certainty, predictability, and uniformity in statutes of limitations. Although these benefits are clear, there is no certainty, predictability, or uniformity regarding the limitations period for section 10(b) claims. Instead, it is an area of confusion and uncertainty, with courts unable to even agree on whether federal or state law should be the source of the statute of limitations. This Court should grant the writ of certiorari in order to bring certainty and uniformity to this important question of federal law.

A certain, predictable, and uniform statute of limitations is fundamental to any cause of action. This is particularly true of securities claims. Fairness dictates that investors know with reasonable certainty the maximum amount of time available to file claims arising from securities violations. Similarly, persons participating in the sale of securities need clear and uniform standards by which they can judge when their exposure to securities

claims is ended. Uncertainty serves neither the buyer nor the seller of securities.

The courts also need certainty and uniformity. Currently, the statute of limitations is an issue in virtually every securities case because the litigants do not know what limitations period will be applied by the district court. Counsel for defendants have the right and duty to argue for the shortest possible limitations period. Counsel for plaintiffs support the longest plausible time period. Therefore, district courts are forced to not only decide *whether* a claim is time-barred, but must also make the threshold determination of *what* limitations period applies. *See, e.g., Levy v. Eletr,* 724 F. Supp. 1269, 1270-72 (N.D. Cal. 1989); *Hempel v. Blunt, Ellis & Loewi, Inc.,* 123 F.R.D. 313, 315 (E.D. Wisc. 1988). This unproductive and time consuming waste of judicial resources could be completely eliminated if this Court were to resolve the issue of the applicable statute of limitations.

Uniformity must be a primary consideration in deciding upon the applicable limitations period. Currently, except in the Third Circuit, different limitations periods apply in each state. For example, a claim filed in the state of Oregon is subject to a two-year statute of limitations, while an action filed in the state of Washington is subject to a three year limitations period. *Nesbit,* 896 F.2d at 384 (applying two-year statute of limitations borrowed from Oregon law); *Reeves v. Teuscher,* 881 F.2d 1495, 1501 (9th Cir. 1989) (applying three-year statute of limitations borrowed from Washington law). More bizarre, claims filed in different federal districts in the *same* state can be subject to *different* limitations periods. For example, a 10(b) claim filed in the *Eastern* District of Arkansas is subject to a one-year-from-discovery/three-years-from-violation limitations period borrowed from the 1934 Act.

Robertson, 732 F. Supp. at 984-85. However, an action filed in the *Western* District of Arkansas is governed by a different limitations period. *Dingler v. T. J. Raney & Sons, Inc.,* 708 F. Supp. 1044, 1054-55 (W.D. Ark. 1989) (applying five-year limitations period based on Arkansas law). Such a crazy patchwork quilt of limitations periods is unjustifiable.

Furthermore, the current framework encourages the disfavored practice of forum shopping. Plaintiffs who have sat on their rights can pick and choose among various forums until they find one with a generous statute of limitations. Under the liberal jurisdiction and venue provisions of the securities laws, defendants can be haled into court almost anywhere, regardless of how tenuous their connection with that jurisdiction.

The lack of uniformity is particularly inappropriate in the area of securities law. A typical securities transaction will touch on many states. A securities issuer in Oregon may work with an underwriter in New York, an attorney in California, an accountant in Illinois, and sell to investors in Texas, New Mexico, Florida, and Arizona. In this simple scenario, eight different limitations periods could apply to one transaction. Neither potential plaintiffs nor potential defendants can have any confidence regarding what limitations period will apply. Furthermore, a court confronted with claims arising from this transaction would have to waste an inordinate amount of time sifting through the laws of the various states to decide which statute or statutes of limitations to apply.

The lack of certainty, predictability, and uniformity arises from many courts' misguided practice of borrowing the limitations period from state law. This habit is completely unjustified in the securities field, which is a matter of particular federal interest and concern. Securities claims are a matter of such great federal interest that Congress has vested the federal courts with exclusive jurisdiction to hear claims arising under the Securities Exchange Act of 1934. 15 U.S.C. § 78*aa*. It is anomalous indeed for state law to provide the limitations period for claims subject to exclusive federal jurisdiction.

The tradition of looking to state law for the statute of limitations is particularly perplexing because Congress has not been silent regarding what limitations period should apply to securities law claims under the 1934 Act. Looking to state law is appropriate where Congress has provided no guidance, but the 1934 Act itself provides that claims under Sections 9, 18, and 29 are subject to the one-year-from-discovery/three-years-from-violation limitations period. 15 U.S.C. §§ 78*i*(e), 78*r*(c), 78*cc*(b). These provisions offer unmistakable guidance regarding Congress's view of what limitations period should apply to claims under the 1934 Act.

There is currently great confusion regarding the statute of limitations for section 10(b) claims. This Court can end this unnecessary and wasteful chaos by settling the question of what limitations period controls section 10(b) claims. That limitations period should be the one-year-from-discovery/three-years-from-violation rule set forth in the 1934 Act itself.

CONCLUSION

This Court should grant the writ of certiorari for the purpose of holding that claims under section 10(b) are subject to the express limitations periods contained in the Securities Exchange Act of 1934. Such a holding would require reversal of the decision of the Ninth Circuit because the investors in this case all purchased their

securities more than three years before filing suit against Petitioner.

Respectfully submitted,

BULLIVANT, HOUSER, BAILEY,
PENDERGRASS & HOFFMAN

By _____
Stephen Joel Wilson
R. Daniel Lindahl

Attorneys for Petitioner Lampf, Pleva, Lipkind, Prupis & Petigrow

APPENDIX A

Section 9(a), (b), (c), (e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*i*(a), (b), (c), (e):

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange —

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (D) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a

national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

(b) It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors —

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege with relation to such security.

* * *

(c) It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered

on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*j*(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities

exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 18(a), (c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*r*(a), (c):

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

* * *

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause

of action and within three years after such cause of action accrued.

Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*cc*(b):

Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: *Provided*, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78*o* of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) or subsection (c) or section 78*o* of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

Rule 10b-5, 17 C.F.R. 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN v. REITZ; JUDITH MACDONALD; DALE R. PETERSON; EARL D. RIDDLE; JACK E. EVANS; HARLAN C. SELBY; ROBERT E. JOHNSEN; PERRY COLEMAN; NICKOLAS J. MADESH; ROBERT A. GRAHAM; JERRY E. MARKS, et al.,
Plaintiffs-Appellants,

v.

LEASING CONSULTANTS ASSOCIATES; WILLIAM MCKENNA; RICHARD A. HEITMEYER; RICHARD D. WELLBROCK; WILLIAM B. WARD, et al.; GLOBAL COMPUTER CORPORATION; RONALD JOHNSON; TEXCOM EQUIPMENT CORPORATION; COMDISCO, INC.; KENNETH M. PONTIKES; MARTIN KARNOFF; JOHN COSTELLO; DAVID MARKS; GORDON S. ROSEN ASSOCIATES, INC.; GORDON S. ROSEN; SOFTWARE SYSTEMS FOR WORD PROCESSORS, INC.; BERLENT INDUSTRIES, INC.; HARVEY BERLENT,
Defendants-Appellees.
No. 88-4077
D.C. Civ-86-1368-RE

MEMORANDUM*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 36-3.

ANTHONY E. CATALAN,
Plaintiff-Appellant,

v.

PAULSON INVESTMENT COMPANY, INC.; LAMPF, PLEVA, LIPKIND; PRUPIS & PETIGROW; COMPUTER VALUE ASSOCIATES; GORDON S. ROSEN ASSOCIATES, INC.; TECHNICAL MARKETING SERVICES, INC.; LEASING CONSULTANTS ASSOCIATES; WILLIAM MCKENNA; RICHARD A. HEITMEYER; RICHARD D. WELLBROCK; WILLIAM B. WARD, et al.,
Defendants-Appellees.
No. 88-4099
D.C. CV-87-593-RE

JOHN GILBERTSON AND JANICE GILBERTSON, et al.,
Plaintiffs-Appellants,

v.

ANDERS G. ARNHEIM; ALANTHUS CORPORATION, formerly known as Technology Finance Group, Inc.; COMPUTER VALUE ASSOCIATES; AMERICAN COMPUTER EQUIPMENT LEASING; LEASING CONSULTANTS ASSOCIATES; GORDON S. ROSEN ASSOCIATES, INC.; WILLIAM MCKENNA; TEXCOM EQUIPMENT CORPORATION; RICHARD A. HEITMEYER; RICHARD D. WELLBROCK; WILLIAM B. WARD, et al.,
Defendants-Appellees.
No. 88-4100
D.C. CV-86-1369-RE

Appeals from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

Argued and Submitted September 12, 1989
Portland, Oregon

Before: PREGERSON, TROTT, and FERNANDEZ, Circuit Judges.

SUMMARY

Appellants, investors in limited partnerships, appeal summary judgment for appellees, creators and marketers of the partnerships, on the ground that statutes of limitation bar appellants' federal and state securities fraud claims.

We hold that questions of material fact remain as to whether appellants had inquiry notice and what knowledge the general partners possessed. We also hold that the statute of limitations period governing the federal securities fraud claims governs the federal RICO claims. Finally, we vacate dismissal of the pendent claims. Accordingly, we reverse and remand.

PROCEEDINGS BELOW

Most appellants filed complaints on November 3, 1986, alleging violations of: § 17(a)(1) of the Securities Act of 1933, 15 U.S.C. §§ 771 and 77g; § 10b of the Securities Exchange Act of 1934 and Rule 10b-5, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, respectively; and federal RICO, 18 U.S.C. § 1961, *et seq.* Appellants also brought pendent state claims.

The district court found, as a matter of law, that time barred the federal claims because: (1) reports to

appellants of the drastic decline in value of their investments had put them on inquiry notice by fall 1982; (2) the general partners' knowledge in summer 1982 of allegations of fraud and the results of an investigation into them constituted inquiry notice that was imputed to appellants; and (3) distribution of the reports and installation of a general partner previously associated with appellees did not constitute fraudulent concealment tolling the statutes of limitations. The district court declined to exercise pendent jurisdiction over the remaining state claims.

STANDARD OF REVIEW

The circuit court reviews de novo the district court's grant of summary judgment. *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 501 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 795 (1989). Summary judgment is appropriate only where no genuine issues of material fact exist, and the moving party is entitled to prevail as a matter of law. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984). The court must view the evidence in the light most favorable to the party opposing the motion. *Id.* "Because our precedent dictates that the question of notice of fraud is for the trier of fact, the party seeking summary disposition has an extremely difficult burden to show that there exists no issue of material fact regarding notice." *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1309-10 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987). Summary disposition on the ground of the statute of limitations is discouraged. Admiralty Fund, 677 F.2d at 1310. A court may grant summary judgment only "if the uncontroverted evidence irrefutably demonstrates that a plaintiff

discovered or should have discovered the fraud but failed to file a timely complaint." *Volk*, 816 F.2d at 1417.

ANALYSIS

I

Inquiry Notice

The analogous forum state statute of limitations period continues to govern § 10(b) claims. *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369 (9th Cir. 1988) (applying analogous state limitations period despite concurrence urging application of analogous federal period). Therefore, Oregon's two-year fraud statute of limitations period governs all of the federal securities claims at bar. *Volk*, 816 F.2d at 1411-12. A four-year period governs the federal RICO claims. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987). If appellants lacked inquiry notice of their federal securities claims by November 1984 (two years before most filed their complaints), then they also lacked inquiry notice of their federal RICO claims by November 1982. Accordingly, we focus upon the issue of whether appellants had inquiry notice of their federal securities claims by November 1984.[1]

Although state law governs the length of the limitations period for the federal securities claims, federal law

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[1]We need not decide whether the federal RICO limitations period begins, as *Volk* suggests, when a federal securities claim begins, or, as appellants urge, when a plaintiff knows or should know of the existence of the elements of an action or the last injury or predicate act occurring as part of the same racketeering activity. Because we hold that the limitations period had not run on appellants' federal securities claims when they filed, the period necessarily had not run on their RICO claims.

controls when the period starts. *Volk*, 816 F.2d at 1412. The statute of limitations (for § 10(b) of the 1934 Act (15 U.S.C. § 78j(b)) and § 17(a)(2)-(3) of the 1933 Act (15 U.S.C. § 77q)) starts upon "actual or inquiry notice that a fraudulent misrepresentation has been made." *Id.* Inquiry notice arises when plaintiff could discover the fraud through the exercise of reasonable diligence. *Id.* "[R]easonable diligence is tested by an objective standard." *Kramas v. Security Gas & Oil, Inc.*, 672 F.2d 766, 770 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982). Investors have inquiry notice of fraud when they "should discover that they paid an inflated price for securities as a result of misleading statements or omissions." *Id.* 1414.

We have reversed summary judgment and held that knowledge of an investment's failure does not necessarily constitute inquiry notice of fraud where nonfraudulent business events might explain the failure. *See, e.g., Admiralty Fund*, 677 F.2d at 1310 (9th Cir. 1982) (declining, dramatically fluctuating stock price did not yield inquiry notice, as a matter of law, that stock offering prospectus had misrepresented issuer's financial strength, because "[g]eneral market conditions, subsequent events, or the inherent risk of the business could have been responsible" for the stock changes); *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1368 (9th Cir. 1978) (knowledge of survivor company's post-merger financial problems — including private placement of stock at lower price than represented at time of merger, missed dividend, and 85% decline in common stock price — did not constitute inquiry notice, where "[m]arket evidence might point equally to a general decline in the economy or post-merger mismanagement as the cause of . . . [the survivor's] financial condition"); *see also Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 878 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984)

(reversing judgment notwithstanding the verdict in holding that knowledge of company's financial problems, including large, rapid decline in stock price, sudden losses, suspension of trading in stock, and difficulty with creditors, did not necessarily suggest accounting fraud, where problems could instead result from "financial mismanagement, cost overruns, general market conditions, or other events unrelated to accounting fraud").

Volk, holding that knowledge that coal mines lacked represented reserves constituted inquiry notice of fraud, is distinguishable. This knowledge necessarily suggested fraudulent misrepresentation of the reserves because the amount of coal was scientifically verifiable and unchangeable in a human timespan. The *Volk* investors knew not only that their investments had performed dramatically below projections, but also that the projections had been based upon facts objectively ascertainable at offering time and not subject to risk of subsequent change. In contrast, in the instant case, appellants' knowledge that the software investment had performed dramatically below projections did not necessarily suggest intentional misrepresentation of income projections, upon which the software appraisals were based, at offering time. Rather, the software failures could have resulted from realization of the risks of technological obsolescence, market change, and lessee marketing difficulties — of which the offering memoranda had warned and to which the Lawrence Reports (except possibly those sent to the Euston Associates investors) had ascribed the failures.

Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980), and *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988), are distinguishable. They involved

sophisticated investors in public stocks with easy access to published market information obviously inconsistent with the representations. In contrast, in the case at bar, the software's poor performance was consistent with risks disclosed in the offering memoranda. As limited partners, appellants lacked easy access to further information as to their investments.

We cannot hold as a matter of law that appellants had inquiry notice of fraud as a result of the Lawrence Reports, offering memoranda, and Mt. Hood Associates "investment package." As discussed above, failure of the software did not necessarily suggest misrepresentations at offering time because the failure plausibly could have resulted instead from nonfraudulent realization of business risks disclosed by the offering memoranda and cited by the Lawrence Reports.

II

Imputed Knowledge

Under both Or. Rev. Stat. § 68.240 and Conn. Gen. Stat. § 34-50, notice to any partner "will operate as notice to, or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.[2] We do not impute the knowledge of an agent to the principal where evidence shows that the former participated in the fraud. *See Admiralty Fund*, 677 F.2d 1310 (knowledge of president of plaintiff mutual fund could not be imputed to plaintiff because plaintiff alleged that president had participated in the fraud).

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[2]Because these provisions are the same, we need not resolve which state's law controls in order to reach our decision.

Questions of fact remain as to the extent of the general partners' knowledge which require resolution before the issues of whether such knowledge yielded inquiry notice and can be imputed to the limited partners arise. *Inter alia*, questions of fact exist as to the content of: (1) Burt's 1982 discussions with the Mt. Hood general partners regarding potential liability of defendants and possible misrepresentation of the software; and (2) Burt's disclosures to the Mt. Hood general partners regarding the results of Taylor's investigation into Poggel's charges.

III

Fraudulent Concealment

A plaintiff bears the burden of proving fraudulent concealment. *Conmar v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 502 (9th Cir. 1988). As appellees contend, to toll the statutes of limitations under this theory, appellants most prove that: (1) appellees affirmatively concealed the existence of the causes of action; and (2) if appellants otherwise had inquiry notice, they diligently investigated the facts yielding notice but did not discover the existence of their claims because of the fraudulent concealment.

Because we hold that a question of fact arises as to whether appellants had inquiry notice, we need not consider whether appellants showed due diligence. *Id.* at 504-05. Also, a question of fact exists as to whether appellees affirmatively concealed appellants' claims by causing the general partners to hire Ward and installing Quenemoen as general partner or administrative assistant of all limited partnerships except LaMar (and by McKenna's denying to Taylor and Burt that any misrepresentation had occurred). Accordingly, factual

issues remain as to whether fraudulent concealment occurred that are not susceptible to summary judgment.

IV

RICO Claims

The Arnheim appellees argue for the first time on appeal that the district court correctly dismissed appellants' federal RICO claims because appellants failed to allege facts showing a pattern of racketeering activity as to these appellees. We do not decide this issue because it is appropriate for remand. *See Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970) (quoting *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)), which states:

> "[T]he appellee may . . . urge in support of a decree any matter appearing in the record . . ." When attention [in the trial court] has been focused on other issues, or when the [lower] court . . . has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question [in the reviewing court] . . . .

V

Pendent Claims

Because the district court predicated dismissal of these claims on an incorrect view of the case, dismissal is vacated. The district court may revive these claims.

CONCLUSION

We emphasize that nothing we have said is intended to indicate any opinion regarding the resolution of the

factual issues on any of the questions involved in this case. We simply hold that genuine issues of material fact remain in each of these areas.

We REVERSE and REMAND for proceedings consistent with our holdings herein.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN V. REITZ; JUDITH MACDONALD; DALE R. PETERSON; EARL D. RIDDLE; JACK E. EVANS; HARLAN C. SELBY; ROBERT E. JOHNSEN; PERRY COLEMAN; NICKOLAS J. MADESH; ROBERT A. GRAHAM; JERRY E. MARKS, et al.,
Plaintiffs-Appellants,

v.

LEASING CONSULTANTS ASSOCIATES; WILLIAM MCKENNA; RICHARD A. HEITMEYER; RICHARD D. WELLBROCK; WILLIAM B. WARD, et al.,; GLOBAL COMPUTER CORPORATION; RONALD JOHNSON; TEXCOM EQUIPMENT CORPORATION; COMDISCO, INC.; KENNETH M. PONTIKES; MARTIN KARNOFF; JOHN COSTELLO; DAVID MARKS; GORDON S. ROSEN ASSOCIATES, INC.; GORDON S. ROSEN; SOFTWARE SYSTEMS FOR WORD PROCESSORS, INC.; BERLENT INDUSTRIES, INC.; HARVEY BERLENT,
Defendants-Appellee.

No. 88-4077
D.C. Civ-86-1368-RE

ORDER

ANTHONY E. CATALAN,
Plaintiff-Appellant,

v.

PAULSON INVESTMENT COMPANY, INC.; LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW; COMPUTER VALUE ASSOCIATES; GORDON S. ROSEN ASSOCIATES, INC.; TECHNICAL MARKETING SERVICES, INC.; LEASING CONSULTANTS ASSOCIATES; WILLIAM MCKENNA; RICHARD A. HEITMEYER; RICHARD D. WELLBROCK; WILLIAM B. WARD, et al.,
Defendants-Appellees.

No.88-4099

D.C. CV-87-593-RE

JOHN GILBERTSON AND JANICE GILBERTSON, et al.,
Plaintiffs-Appellants,

v.

ANDERS G. ARNHEIM; ALANTHUS CORPORATION, formerly known as Technology Finance Group, Inc.; COMPUTER VALUE ASSOCIATES; AMERICAN COMPUTER EQUIPMENT LEASING; LEASING CONSULTANTS ASSOCIATES; GORDON S. ROSEN ASSOCIATES, INC.; WILLIAM MCKENNA; TEXCOM EQUIPMENT CORPORATION; RICHARD A. HEITMEYER; RICHARD D. WELLBROCK; WILLIAM B. WARD, et al.,
Defendants-Appellees.

No. 88-4100

D.C. CV-86-1369-RE

Before: PREGERSON, TROTT, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion to rehear the case en banc, and no judge has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN V. REITZ, et al.,
Plaintiffs,

v.

LEASING CONSULTANTS ASSOCIATES, et al.,
Defendants.

Civil No. 86-1368-RE

JOHN AND JANICE GILBERTSON, et al.,
Plaintiffs,

v.

LEASING CONSULTANTS ASSOCIATES, et al.,
Defendants.

Civil No. 86-1369-RE

ANTHONY E. CATALAN,
Plaintiff,

v.

PAULSON INVESTMENT COMPANY, INC., et al.,
Defendants.

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REDDEN, Judge: These are three consolidated securities cases involving seven limited partnerships. Defendants move for summary judgment urging that the statutes of limitations bar plaintiffs' claims. I grant the motions.

BACKGROUND

I. Introduction

Plaintiffs seeking tax shelters invested in seven limited partnerships during the years 1979 through 1981. Tax problems arose, but plaintiffs did not then attempt to investigate their claims or file this action. When the tax shelters collapsed, plaintiffs paid no heed to their investments but instead sought to resolve their tax problems. Many plaintiffs became aware of the alleged securities claims only after attorneys for a potential defendant notified them of the possible claims in 1986. Plaintiffs, on the advice of counsel, waited several more months before filing. When plaintiffs settled with the Internal Revenue Service (IRS) they finally filed their complaints.

II. The Parties and the Structure of the Partnerships

These actions are identical for the purposes of these motions.

I noted in my June 17, 1987 Opinion that plaintiffs are limited partners in seven partnerships: Columbia Associates Limited Partnership (Columbia); Duval Associates Limited Partnership (Duval); Euston Associates Limited Partnership (Euston); Lamar Associates Limited Partnership (Lamar); Mt. Hood Associates Limited Partnership (Mt. Hood); Salem Associates Limited Partnership (Salem); and Troy Associates Limited Partnership (Troy). The actions involve several of the partnerships and sometimes different partners, and I refer to the plaintiffs by partnership.

Defendants are best identified by their various roles in the sales of partnerships and in operations of the partnerships themselves. The core defendants are those who organized and packaged the entire investment scheme.

The packagers are: Leasing Consultants Associates (LCA); Leasing Consultants, Inc. (LCI); William McKenna; Richard A. Heitmeyer; Richard D. Wellbrock; and William Ward.

In addition to the core defendants, several groups of additional defendants are involved. Each partnership involved purchases of certain IBM computer equipment (the hardware); and the purchase of various types of software equipment (the software). The scheme had an immediate seller purchase the equipment from the equipment seller, following which the partnership would purchase the equipment from the immediate seller. Then the partnership would lease the equipment back to the equipment seller or the affiliated lessee. In the hardware transactions, the hardware seller and lessee were the same but in the software transactions the software seller was affiliated with the software lessee. These two groups of sellers/lessees form another group of defendants. The immediate group of sellers are Computer Systems Consultants, Inc. (Computer Systems), LCI, LCA and American Computer Equipment Leasing, Inc. (American Computer).

The hardware equipment sellers/lessees are: Analysis International Co., Inc. (Analysis); Alanthus Computer Corp. (Alanthus); Comdisco, Inc. (Comdisco); and Rockwood Computer Corp. (Rockwood). The software equipment sellers are: Rosen Associates (Rosen); Kirby Microprocessors, Inc. (KMI); M.A. Hanson & Associates (Hanson); Robrech Systems, Inc. (Robrech); Buhler Software Services (Buhler); ASG Program Products, Inc. (ASG); and Start System, Inc. (Start). The affiliated software lessees are: Software Systems for Word Processors, Inc. (SSWPI) affiliated with Rosen; Kirby Computer Systems, Inc. (Kirby Computer) with KMI;

Prose, Inc. (Prose) with Hanson; Digitize, Inc. (Digitize) with Robrech; P-STAT, Inc. (P-Stat) with Buhler; Applications Systems Group, Inc. (Applications) with ASG; and Jeflen Consulting Corp. (Jeflen) with Start.

The remaining defendants are the equipment appraisers who evaluated the equipment and the attorneys who helped organize the partnerships and provided legal advice including a tax opinion. The hardware appraisers are Computer Value Associates (Value); Berlent Industries, Inc. (Berlent); TexCom Equipment Corp. (Texcom); and Global Computer Corp. (Global). The software appraisers are Technical Marketing Services, Inc. (TMS); Ward; Edward Fizell; ConServ International, Inc. (ConServ); and Information Industries, Inc. (Information). The attorneys are Lampf, Pleva, Lipkind, Prupis & Petigrow, P.C., and Arnheim & McCostis.

In addition to these, other defendants include affiliated entities and controlling persons of some of the abovementioned entities. I need not develop the roles of these defendants. A more detailed analysis of the parties and their roles is set forth in my June 17, 1987 Opinion.

Although the sales of the equipment were the same, the marketing of the equipment differed. Because the hardware was already in use at the time of the purchase, the hardware lessee did not have to find a sublessor for the equipment. The software, however, was novel. It had not been marketed and licensed prior to sale. The success of the software was key to the success of the limited partnerships. Each partnership targeted a different market and the software determined that market.

III. The Sale and Operation of the Partnerships

Plaintiffs purchased interests in the partnerships during the years 1979 through 1981. Plaintiffs allege that the packagers prepared investment memoranda for the partnership offerings and that they relied on these memoranda in making their investments. The memoranda contained statements involving the risk of investment, appraisals of the equipment and tax opinions.

General partners controlled each partnership. Roger Nelson and James Quenemoen controlled Duval and Troy; Richard Anderson controlled Lamar; Michael Welwood, Frank Leahy and Quenemoen controlled Mt. Hood; Robert Williams and Quenemoen controlled Columbia and Euston; J. Richard Hurst controlled Salem, and Nelson controlled Troy. Each partnership retained consultants. William Ward ultimately served as consultant for all.

Ward rendered his services through the Lawrence Group, Inc. Periodically, Ward provided the general partners with reports which discussed the status and problems of each partnership (the Lawrence Reports). According to defendants, the general partners sent these reports to the limited partners including plaintiffs.

IV. The Problems

The partnerships had trouble early on because of several factors, including technological obsolescence. Plaintiffs received reports that the software sales were dismal and the hardware's value was rapidly declining. With the possible exception of those in Lamar, plaintiffs received reports in late 1982 and early 1983 recommending a change in the character of the investments. In 1983,

Mt. Hood sold its software back to the seller and invested the proceeds in commercial real estate.

In late 1982 and early 1983, plaintiffs received notice that the IRS was investigating the partnerships. The law firm of Hagen & Dye represented most of the partnerships before the IRS.

Paulson Investment Co., which sold some of the partnership interests, sensed potential liability and retained the law firm of Stoll & Stoll. In mid-1986, the Stoll firm advised Paulson of significant liability exposure and suggested a way to eliminate that exposure. Paulson would fund plaintiffs lawsuit in exchange for plaintiffs' promises not to sue Paulson. In a "Dear Investor" letter, the Stoll firm advised plaintiffs it would file the lawsuit two months after the IRS's offer of settlement. The *Reitz* and *Gilbertson* plaintiffs accepted Paulson's offer and filed December 5, 1986.

Plaintiff Catalan declined Paulson's offer and filed an independent action in early June 1987, against Paulson and the defendants named in the other two cases. On January 5, 1988, Catalan agreed to dismiss Paulson with prejudice. Paulson, however, remains a third party defendant by virtue of a claim against it for indemnity and contribution. My Opinion of August 13, 1987 discusses this in greater detail.

V. The Allegations and the Record

The fourth amendment complaints (the complaints) allege that plaintiffs were induced to make the investments by several misrepresentations in the offering memoranda. Those misrepresentations are that the investments would entitle plaintiffs to substantial tax benefits; that the leasing of the hardware/software packages would

generate a profit; that the software was readily marketable; and that the equipment appraisals were reasonable and accurate. Plaintiffs allege that subsequent investigations revealed that these representations were false.

The complaints allege seven claims for the sales of the seven partnerships. Each claim contends the traditional several counts. Plaintiffs allege (1) violations of section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77(q)(a); (2) violations of section 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); (3) violations of Oregon securities laws, O.R.S. 59.135; (4) violations of federal RICO, 18 U.S.C. § 1962(c) and (d); (5) violations of the Oregon RICO statute, O.R.S. 165.720(3) and (4), O.R.S. 166.720(4); and (6) several common law claims for fraud, negligence and negligent misrepresentation against various defendants.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Service v. Pacific Electrical Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable party could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp.*

v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, then the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Celotex*, 477 U.S. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical*, 809 F.2d at 630.

DISCUSSION

I. Introduction

Defendants move against the claim under section 17(a) and I grant the motion to dismiss. *In re Washington Public Power Supply System Securities Litigation*, 823 F.2d 1249, 1358 (9th Cir. 1987).

I later discuss defendants' motion against the pending state claims and grant it.

As to the statute of limitations issue, defendants argue that plaintiffs were on inquiry notice. Defendants say plaintiffs had direct knowledge of possible fraud with the receipt of the Lawrence Reports outlining the partnerships' dismal performance, and that plaintiffs knew of possible fraud by imputation, due to the knowledge of the general directors.

Plaintiffs challenge both of these contentions. As to the Lawrence Reports, plaintiffs argue that defendants have not shown their receipt of the reports, and further that even if they received same, the reports would not have put

a reasonable investor on notice. Plaintiffs also contend that even if they were on inquiry notice, defendants fraudulently concealed the relevant information from them. As to the knowledge by imputation, plaintiffs argue that the general partners exercised due diligence but failed to discover the fraud. Again, plaintiffs invoke the doctrine of fraudulent concealment.

II. The Statute of Limitations

A. Standards

The federal securities claims are subject to Oregon's two year statute of limitations for fraud, O.R.S. 12.110(1). *Robuck v. Dean Witter & Co.*, 649 F.2d 641, 643 (9th Cir. 1980). The limitations period for the federal RICO claims is four years. *Agency Holding Corp. v. Massey-Duff & Assoc., Inc.*, ____ U.S. ____, 107 S. Ct. 2759 (1987). There is a three year statute of limitations on the state securities claim, O.R.S. 59-115(b)(5) (1983) as well as on the common law claims, O.R.S. 12.110(1). A five year statute of limitations applies to the Oregon RICO claims, O.R.S. 166.725(11) (ORICO). If the statute of limitations bars the federal claims, including RICO, it will also bar all of the state claims except ORICO.

Federal law controls the point at which the statute of limitations commences to run for these federal claims. *Vold v. D.A. Davidson*, 816 F.2d 1406, 1412, 1415 (9th Cir. 1987). Normally, the period commences at the time of injury; for instance, in cases involving securities fraud, the investor suffers injury when he enters into a transaction as a result of a material misrepresentation. *Id.* at 1912. However, the statute of limitations is not triggered until the defrauded individual has actual or inquiry notice. That is, the statute begins to run when plaintiff in the exercise of due diligence discovered or should have dis-

covered the facts of which he complains. *Id. See Maggio v. Gerard Freezer & Ice Co.,* 824 F.2d 123, 129 (1st Cir. 1987) (noting that the statute commences when the investor should have known of the possibility of fraud).

As to inquiry notice, knowledge of all the facts is not necessary to commence the limitations period. *See Meadows v. Bicrodyne Corp.,* 785 F.2d 670, 672 (9th Cir. 1986). The clock begins to run when a plaintiff senses "storm warnings", *Cook v. Avien, Inc.,* 573 F.2d 685, 696 (1st Cir. 1978), not when he hears thunder and sees lighting. *Jensen v. Snelling,* 636 F. Supp. 1305, 1309 (E.D. La. 1986). A plaintiff is on inquiry notice if he possesses such knowledge as would alert a reasonable investor to the possibility of fraud. *Maggio,* 824 F.2d at 128.

B. Direct Knowledge: the Lawrence Reports

1. Individual Receipt of the Lawrence Reports

Plaintiffs would create a factual dispute regarding their receipt of the Lawrence Reports. They contend that defendants have failed to authenticate the reports or show the relevance of them. Plaintiffs, however, produced the reports and concede receipt by alleging that these reports lulled them into inaction. Defendants have shown that the Lawrence Reports were sent with the periodic reports from the general partners. There is no genuine issue of material fact as to plaintiffs' receipt of the Lawrence Reports.

2. The Contents of the Reports

The Lawrence Reports showed that although the investment memoranda projected significant sales, the partnerships showed no sales. These dismal reports continued until 1982, when Ward recommended considering other options. Most of the partnerships considered return of the software during 1982, but only Mt. Hood opted for return and reinvestment in real estate.

The Mt. Hood plaintiffs whose partnership closed on September 29, 1980, received a June 29, 1981 report indicating no software sales; a November 14, 1981 report indicating that of 140 projected sales, none had been made, and the marketing effort was very poor. They also received a May 17, 1982 report stating that the software marketing was unsuccessful and urging other options, as well as a June 6, 1983 report indicating that the value of the hardware was declining sharply.

The Salem partnership experienced similar difficulties. As early as December 1981, the software required re-programming to run on different hardware. During the same period, the sales of the software licenses were at a standstill, and by July 1982, the required re-programming was not yet complete. It was reported that re-programming was not worthwhile, and that there were no current sales.

The Lamar partnership suffered a similar plight. In his appraisal, Ward indicated that eight hundred software licenses would be sold in the first three years. Anderson, the general partner, indicated in 1981 that only one license had sold. Anderson also reported that the software needed revision which could cost as much as $50,000. He also reported new loans to Robrech and

Digitize. Finally in October 1982, Anderson reported that only three licenses had been sold.

The remaining partnerships experienced similar difficulties. The reports of the general partners, as well as the Lawrence Reports indicated that the software licenses were not selling and the software required re-programming. These problems with the all-important software sales should have given notice to a reasonable investor that something was amiss.

In addition to these reports, plaintiffs also received reports that the hardware was declining sharply in value. Plaintiffs also received information that the rental income from the hardware had been deferred or was unpaid.

3. Conclusion

I find that the Lawrence Reports would have placed a reasonable investor on notice of the possibility of fraud as early as the fall of 1982. Plaintiffs contend that they exercised due diligence by relying on the reports of the general partners and on the Lawrence Reports. Plaintiffs argue that these reports were consistent with the offering memoranda and contained no specifics as to the facts underlying their claims. They also contend that defendants fraudulently concealed the true scope of the problems through these reports. These arguments are not supported by the record or the law.

If the contents of the reports were consistent with the offering memoranda, then the offering memoranda put plaintiffs on sufficient notice of the possibility of fraud. The reports need not contain the details of the fraud to trigger inquiry notice but need only put plaintiffs on notice of the possibility of fraud, e.g., their investment was worth less at investment time than they actually paid for it.

I find that the Lawrence Reports put plaintiffs on inquiry notice of the possibility of fraud. The reports did not conceal their claims.

C. Notice by Imputation

1. Introduction

In addition to the Lawrence Reports, the general partners had access to other sources of information such as reports from their attorneys and the allegations of an offeree representative, George Poggel. Defendants argue that such knowledge constituted notice of the possibility of fraud and should be imputed to plaintiffs.

The limited partnerships were Connecticut corporations and the interests were sold in Oregon. Both Oregon and Connecticut recognize that notice to or knowledge of the general partners regarding matters relating to the partnership operate as notice to or knowledge of the partnership. O.R.S. 68.240; Conn. Gen. Stat. §§ 34-50. Both states also recognize that fraud on the partnership committed by or with consent of the partner bars imputation. O.R.S. 68.240; Conn. Gen. Stat. §§ 34-50. There is no conflict of laws problem, and I apply the law of the forum, Oregon. *See Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

Defendants point out that the general partners knew of the problems in early 1982, and focus their discussions on Quenemoen who was a general partner of or connected to all of the partnerships save Lamar. Plaintiffs do not suggest that Anderson, Lamar's general partner, had no such notice. Anderson advised the limited partners of the poor sales as early as 1981, and of the IRS audit in October 1982. Defendants also point out that several other events put the general partners on notice of the possibility of fraud.

Plaintiffs argue that the general partners exercised due diligence and discovered no fraud. They also argue that the general partners were part of or consented to the fraud.

2. The General Partner's Knowledge

a. The Burt Report

In July 1982, Mt. Hood retained attorney Robert Burt to represent them in the IRS investigation. Burt's investigation led him to believe that defendant LCI might be liable by reason of misrepresentation, fraud, negligence and breach of contract. Although defendants indicate that most of Burt's discussions were with Welwood, Burt indicated that all of Mt. Hood's general partners, including Quenemoen, decided not to pursue these claims for business reasons. Defendants argue that Quenemoen's knowledge acquired in the Mt. Hood investigation should be imputed to the other partnerships in which he participated.

b. The Poggel Allegations

To effect the Mt. Hood change in investments, Burt prepared an extensive information packet which explained the exchange. George Poggel, the offeree representative for plaintiff Marchette, responded to the packet alleging possible fraud, conflicts of interest and possible criminal violations. Burt had an associate, Dana Taylor, investigate the allegations. According to Taylor his investigation was limited to a possible conflict of interest. The result of the Taylor investigation were negotiations in 1982 over a proposed indemnity agreement between defendants LCI, LCA, Hamilton Resources and McKenna, and the Mt. Hood partnership. Ultimately, the parties reached a narrower agreement. However, defendants contend that the fact that the general partners attempted to

secure such an agreement indicates that they feared securities claims.

3. Conclusion

I find that both sources, as well as the Lawrence Reports, put the general partners on inquiry notice of the possibility of fraud. Indeed, Burt suggested this possibility. Further, the very reports of the general partners indicated that the investments had significant problems and might not be worth as much as plaintiffs paid for them.

Plaintiffs contend that the general partners exercised due diligence and did not discover the facts underlying their claims. As to the Burt report, plaintiffs contend that he never performed any factual investigation to determine or substantiate the possible liability. However, as noted above, Burt suspected the possibility of fraud, and this knowledge is sufficient for inquiry notice.

Further, as to the Poggel allegations, plaintiffs contend that Taylor's investigation satisfied the due diligence requirement. According to plaintiffs, Poggel only complained of a possible conflict of interest and Taylor's investigation was limited to this issue. However, as noted above, the Poggel allegations went beyond a conflict problem and also raised the possibility of fraud.

III. Fraudulent Concealment

A defendant's conduct may serve to toll the statute of limitations if it is established that the defendant intentionally concealed the fraud. *Volk,* 816 F.2d at 1415, 1416. To establish fraudulent concealment, plaintiff must demonstrate affirmative conduct on the defendant's part which, under the circumstances, would lead a reasonable person to believe that he did not have a claim. *Id.*

Plaintiffs contend that defendants fraudulently concealed the securities problems in two ways: (1) the Lawrence Reports lulled plaintiffs into inaction; and (2) LCI installed Quenemoen as general partner. Plaintiffs contend that the Lawrence Reports were consistent with the risks disclosed in the various offering memoranda, and point out that the reports were not entirely negative.

However, this argument cuts two ways. If the investment memoranda disclosed the risks, then plaintiffs were on notice at the time of purchase. If investment memoranda contain conflicting data on the investment, plaintiffs cannot choose the positive without taking into account, i.e., being on notice, of the negative. *Kennedy v. Josephthal & Co., Inc.*, 814 F.2d 798 (1st Cir. 1987).

Further, as noted above, I find that the Lawrence Reports put plaintiffs on inquiry notice. If these reports and those of the general partners put plaintiffs on inquiry notice, then the same reports could not have concealed the fraud.

Plaintiffs say Quenemoen was a former LCI employee and that he was installed as general partner by LCI. They offer nothing to suggest that the prior association was improper or that Quenemoen was actively engaged in the fraud or consented to it. Even if Quenemoen consented to the fraud, his knowledge may be imputed for the sake of third parties not participating in the fraud. *Armstrong v. Ashley*, 204 U.S. 272 (1907).

IV. Conclusion

I find that plaintiffs were on inquiry notice, either directly or indirectly, of the possibility of fraud as early as October 1982. The *Reitz* and *Gilbertson* plaintiffs filed in December 1986. Catalan filed in June 1987. Therefore, all the federal claims are barred by the relevant statutes of limitations.

Only the ORICO claim remains. I decline to exercise pendent jurisdiction over this state claim, and I dismiss it for want of subject matter jurisdiction.

I grant defendants' motions for summary judgment.

Dated this 13th day of July, 1988.

JAMES A. REDDEN

James A. Redden
United States District Judge